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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 663

WILSON & CO., INC., A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

RICHARD C. WINKLER,
4100 South Ashland Avenue,
Chicago, Illinois,

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735 First National Building,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

Dated this 29th day of October, 1946.

THE DUNTHORP-WARREN PRINTING COMPANY, 816 WEST JACKSON, CHICAGO

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To the Honorable, Justices of the Supreme Court of the United States:

Comes now Wilson & Co., Inc., petitioner in the above matter and respectfully shows to this Honorable Court:

A.

Summary Statement of Matter Involved.

Respondent, National Labor Relations Board, issued an order on August 30, 1945, preceded by a charge filed on July 24, 1944, by Local Union No. 227 of United Packinghouse Workers of America, C. I. O. (hereinafter called "the Union"); an amended charge filed by the Union on

December 3, 1944; a complaint issued by the Board on January 16, 1945; and a hearing on the complaint from February 6, 1945 to February 9, 1945. In its Decision and Order dated August 30, 1945, the Board found that the Employees' Representative Committee (hereinafter called "the E. R. C."), a union recognized by petitioner as the sole bargaining agent for its production and maintenance employees at its Oklahoma City, Oklahoma plant, was company dominated within the meaning of Section 8(2) of the National Labor Relations Act (49 Stat. 449, Title 29 U. S. C. A. Section 151-161, hereinafter called "the Act").

In its Order, the Board ordered the Company to withdraw recognition from the E. R. C. and to completely disestablish the E. R. C. Feeling aggrieved by the order of the Board, on September 17, 1945, petitioner filed a Petition for Review in the United States Circuit Court of Appeals for the Tenth Circuit, under Sections 10(e) and (f) of the Act, setting forth its exceptions to the Board's Order.

Subsequently, on April 24, 1946 petitioner filed a Motion to Include Additional Evidence in the Record. Also, on May 9, 1946 petitioner filed a second Motion with the Court to Include Other Additional Material Evidence in the Record.

Oral argument was made in Oklahoma City, Oklahoma before the Tenth Circuit Court of Appeals on May 20, 1946 at which time said Motions were argued.

The opinion of the Tenth Circuit Court of Appeals was filed on July 8, 1946, and subsequently the decree was entered on August 17, 1946 which provided for the enforcement of the Board's Order. Petitioner filed a Petition for Rehearing with the Circuit Court of Appeals on September 3, but said petition was denied by the Court on September 21, 1946.

B.

Basis of Jurisdiction.

Jurisdiction in this case is granted to the Supreme Court under Sections 10(e) and (f) of the Act.

C.

Questions Presented.

The novel questions presented by this case which warrant review on certiorari are first, whether or not the Tenth Circuit Court of Appeals in deciding the case has decided a Federal question in conflict with applicable decisions of this Court; or second, whether the Circuit Court of Appeals has departed so far from the accepted usual proceedings as to the call for intervention by this Court. More specifically, petitioner contends that the Tenth Circuit Court of Appeals was in error and prejudiced petitioner's legal rights in denying the above mentioned Motions of petitioner. These Motions applied to the Court for leave to refer this case back to the Board for the purpose of adducing additional evidence on two material points which would have changed the Board's final Decision and Order in this case. It was impossible to present this evidence to the Board prior to its Decision and Order of August 30, 1945 since this evidence did not materialize until after that date. The relevancy and materiality of this evidence, which bears directly on the issue in the instant case, is unquestioned.

D.

Reasons Relied On For Allowance of Writ.

The questions presented in this case are of such importance that they necessarily require a determination by this Court of the constitutional and legal rights of petitioner, and further, in order to properly determine procedural matters arising under Sections 10(e) and (f) of the Act, in accordance with the previous precedents of this Court and to prevent the deprivation of petitioner's legal rights without due process of law as guaranteed by the Constitution.

WHEREFORE, your petitioner respectfully prays that certiorari be granted herein.

Respectfully submitted,

RICHARD C. WINKLER,
4100 South Ashland Avenue,
Chicago, Illinois,

FRANK G. ANDERSON,
735 First National Building,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

Dated this 29th day of October, 1946.

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ARGUMENT.

I.

Petitioner's First Motion to Include Additional Evidence.

Section 10(e) of the National Labor Relations Act, 49 Stat. 449, provides in part as follows:

> "If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing

> before the Board, its member, agent or agency, the Court may order such additional evidence to be taken before the Board, its member, agent or agency and to be made a part of the transcript. The Board may modify its findings as to the facts or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order."

On the basis of the above quoted portion of Section 10(e) of the Act, petitioner filed a motion with this Court on April 24, 1946, requesting that the Court include in the Record photostatic copies of the Decision and Direction of Election, Election Result at the Oklahoma City plant, and Order Dismissing Petitions, all bearing a date of December, 1945 (The Board's Decision and Order in the instant case was dated August 30, 1945), which were attached to said Motion.

Thereafter, petitioner was advised by letter from the Clerk of the Tenth Circuit Court of Appeals that the Court would rule on this Motion at the time of the oral arguments.

Oral arguments were made in Oklahoma City on May 20, 1946 and at that time the Court pointed out to petitioner that under Section 10(e) of the Act, the Court had no power to include the evidence requested in the Record of the case unless it first sent the matter back to the Board for the purpose of adducing further evidence in order to give the Board a chance to consider the additional evidence and perhaps modify or set aside its original order. At the oral arguments petitioner's counsel recognized the Court's position stating that the sole and only reason the Motion was worded as it was, was to avoid delay, especially since the evidence consisted of the Board's own records.

Recognizing the inability of the Court to consider the evidence without first sending the case back to the Board for the purpose of obtaining additional evidence, petitioner's counsel agreed that the Court had no alternative but to send the case back to the Board to take this additional material evidence. The Court did not rule upon petitioner's request at the time of the argument and petitioner was under the impression that the Court was weighing the advantage of sending the case back to the Board against the disadvantage of a delay that would hold up the final disposition of the case.

This evidence is highly material since it shows that the employees, in a Board-conducted election in which the E. R. C. was not permitted to be on the ballot, voted overwhelmingly against having the C. I. O. as their bargaining agent.

National Labor Relations Board v. *Indiana and Michigan Electric Co., et al.*, 318 U. S. 9, 87 L. Ed. 579.

National Labor Relations Board v. *New York Mdse. Co., Inc.* (C. C. A. 2d) 134 F. (2d) 949, 951.

Consolidated Edison Co. v. *National Labor Relations Board* (1938) 305 U. S. 197, 238.

Petitioner now renews its request to this Court to reconsider the first motion of petitioner and to order the case sent back to the Board for the purpose of receiving and considering the additional material evidence and thereafter to file its recommendations, if any, for the modification or setting aside of its original order. Petitioner contends that this motion was made at the time of the oral arguments and that the Board received proper notice of such motion and was given ample opportunity to present its argument against such motion. That this election is

material and has a vital bearing on the issues in this case is self-evident since it clearly shows that the employees involved did not want the C. I. O. to represent them and wanted the E. R. C. to continue representing them.

Obviously this evidence is not contained in the record upon which the Board's Decision is predicated because the election took place many months after the date the Board's Decision was issued.

II.

Petitioner's Second Motion to Include Additional Evidence.

On May 9, 1946 petitioner filed a second motion with the Court to include additional material evidence in the Record. The evidence requested to be included covered by this second motion was proper and material evidence offered and erroneously excluded by the Trial Examiner on the grounds that it was immaterial. This evidence would have shown that the E. R. C. received the same treatment as C. I. O. units in other plants of petitioner and that the latter have not been condemned by the Board as company dominated unions. Petitioner's offer of proof is fully set out in the second motion dated May 9, 1946 and also in Section I-E of petitioner's Brief, at pages 61-66.

In its opinion the Tenth Circuit Court of Appeals did not pass upon the admissibility or materiality of this evidence stating that even if the evidence were admitted and considered, it would not change the result.

Petitioner contends that this material evidence should be admitted and if admitted, would legally justify certain of petitioner's practices in its relationship with the E. R. C., particularly since they are condoned in dealing with C. I. O. unions. To hold contrary would clearly be discriminatory. In some instances practices such a furnishing a meeting

place without charge, meeting during working hours with no time deductions, use of company's facilities, etc., are common in plants where the C. I. O. is the bargaining agent. With this evidence in the Record the Board would have had insufficient grounds to support its findings of company domination on this point, with the resultant disestablishment of the E. R. C. unless similar restrictions were also applied in plants where the C. I. O. represents employees.

Petitioner submits to the Court that the proper procedure for the determination of the receipt of this evidence as requested on the two Motions set forth above would be to send the case back to the Board for the purpose of taking further evidence on these points. Until this is done, neither the Court nor the petitioner has any way of knowing whether or not the Board might change its Decision and Order and thereby properly decide the controversy in this case. Until this is done, the procedure required under the Act will have been violated and a proper judicial determination could not be effected.

National Labor Relations Board v. *Cheney Calif. Lumber Co.*, ... U. S. ....., 66 S. Ct. 553.

Marshall Field & Co. v. *National Labor Relations Board*, 318 U. S. 253, 63 S. Ct. 585.

Petitioner also contends that there is insufficient evidence in the record to warrant a complete disestablishment of the E. R. C. and that if there is any basis for issuing a decree at all, it should be limited to a cease and desist order as to certain practices.

National Labor Relations Board v. *Express Publishing Co.* (1941) 61 S. Ct. 693.

The employees of petitioner's Oklahoma City plant have clearly demonstrated through a Board-conducted election

that they do not want the C. I. O. to represent them. The employees have clearly demonstrated that the E. R. C. is their free choice as bargaining agent, as provided in the Act.

The National Labor Relations Act and the legislative history of said law does not preclude an independent labor organization from being lawful. It is not within the province of the Board to limit the legal existence of labor organizations to nationally affiliated unions as the Board has attempted to do in this case.

Consolidated Edison Co. v. *National Labor Relations Board* (1938) 305 U. S. 197, at 238.

Southern Association of Bell Telephone Employees v. *National Labor Relations Board* (C. C. A. 5) 129 F. (2d) 410, 411-412 reversed, 319 U. S. 50.

Southern Steamship Co. v. *National Labor Relations Board,* 62 S. Ct. 886, 894.

National Labor Relations Board v. *Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, at 46, 47, 57 S. Ct. 615.

Conclusion.

Petitioner submits that the Tenth Circuit Court of Appeals is in error in failing to send this case back to the Board for the purpose of taking additional material evidence. The evidence submitted in petitioner's first and second Motions is of the highest materiality and petitioner feels its inclusion would change the entire outcome of the case before the Board.

In the interest of determining procedure on matters arising under Sections 10(e) and (f) of the Act, and to prevent deprivation of petitioner's legal rights without due process of the law, petitioner submits that this Court

should take jurisdiction on certiorari and settle the important questions presented in this case.

Respectfully submitted,

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Counsel for Petitioner.

Dated this 29th day of October, 1946.